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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1999

ROGER REEVES,

*Petitioner,*

v.

SANDERSON PLUMBING PRODUCTS, INC.,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONER

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**OTHER AUTHORITIES**

Amar, Vidram David, *Jury Service as Political Participation Akin to Voting*, 80 Cornell L. Rev. 203 (1995).....8
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PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1778-1788 (John B. McMaster & Frederick D. Stone eds. 1988) .....7
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Scheiner, Alan Howard, *Judicial Assessment of Punitive Damages, and the Politics of Jury Power*, 91 Colum. L. Rev. 142 (1991) ..... 8
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## AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONER

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## IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ("ATLA") respectfully submits this brief as amicus curiae in this case. Letters from both parties granting consent to the filing of this brief have been filed with this Court.[1]

ATLA is a voluntary national bar association whose approximately 50,000 trial lawyers primarily represent

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[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amicus Curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

injured plaintiffs in civil actions. Central to ATLA's mission is the preservation of the right to trial by jury, guaranteed by the Seventh Amendment in the Constitution of the United States as well as the constitutions of nearly every State.

This right was placed in the Bill of Rights primarily as a guard against encroachment by judges on the historic role of the jury. ATLA is concerned that aggressive appellate review of jury verdicts based on sufficiency of the evidence threatens to undermine this important and fundamental right.

In ATLA's view, judicial authority to overturn a jury's verdict and enter judgment for the opposing party carries grave potential danger to the right to trial by jury. For that reason, the exercise of that authority should be subjected to the closest scrutiny.

## SUMMARY OF THE ARGUMENT

1. The right to trial by jury in civil cases is in danger of being eroded by aggressive review of jury verdicts on the part of federal appellate courts.

The jury trial is not merely a procedural device. It is a fundamental right and an essential element of self-government which the drafters of the Bill of Rights sought to preserve. To safeguard that right from judicial usurpation, the Seventh Amendment prohibits federal courts from reexamination of facts found by a jury except under the rules of common law.

The common law provided no means of reexamining factual issues decided by juries, except as issues of law where no evidence supported the verdict. At the trial level, judges have relaxed that standard, employing the "substantial evidence" or "reasonable jury" test in passing upon motions for judgment as a matter of law.

Entry of judgment as a matter of law by appellate courts to set overturn jury verdicts was approved by this



court relatively recently. However, appellate courts have adopted for themselves the standard of sufficiency of the evidence employed by many trial courts, reviewing the sufficiency of evidence de novo, based on review of all the evidence of both parties and applying the "reasonable jury" test. The result has been a dramatic increase in the number of jury verdicts overturned by courts of appeals with entry of judgment as a matter of law, rather than new trial. Such aggressive review of jury verdicts for sufficiency of evidence threatens the essential function of the jury protected by the Seventh Amendment. It is also inconsistent with Federal Rule of Civil Procedure 50, which provides for an informed discretionary decision whether to enter judgment as a matter of law or order a new trial where the evidence has been found insufficient to support the verdict.

2. This Court should hold that courts of appeals may enter judgment as a matter of law against the verdict winner only in cases in which no evidence supports the jury's verdict. Where there exists some evidence, albeit not legally sufficient, the appellate court may enter a new trial or remand to the trial judge to make the discretionary determination of whether a new trial or judgment as a matter of law is warranted.

Such a ruling carries out the purpose of Fed. R. Civ. Pro. 50 and this Court's decisions which place great reliance on the unique position occupied by the trial judge to exercize informed discretion in deciding whether to enter judgment or order new trial. It also conforms with this Court's decisions under the Seventh Amendment which have applied the no-evidence rule to appellate courts evaluating the sufficiency of the evidence.

Limiting the power of appellate courts to enter judgment as a matter of law to "no-evidence" cases also serves strong policy interests. It results in greater fairness to the verdict winner who was entitled to rely on the trial judge's determination that the evidence was sufficient for the

jury. It results in greater accuracy of factual determinations in civil cases, particularly those where the jury challenged jury finding relates to matters of intent or motive, where juries are likely to be more reliable factfinders than appellate judges. Finally, the rule represents the best use of judicial resources, placing the decision between judgment or a new trial in the hands of the trial judge, is best equipped to make that decision.

## ARGUMENT

### I. ENTRY OF JUDGMENT AS A MATTER OF LAW BY AN APPELLATE COURT, CONTRARY TO A JURY'S VERDICT AND BASED ON DE NOVO REVIEW OF ALL THE EVIDENCE, UNDERMINES THE SEVENTH AMENDMENT.

#### A. The Re-examination Clause of the Seventh Amendment Protects the Fundamental Right And Vital Democratic Institution of Trial By Jury From Judicial Usurpation.

The American civil jury is in danger.

The founding generation, who fought to secure for themselves the right to trial by jury in civil cases, were so fearful that this right would be undone by federal appellate reexamination of jury findings, that they included a specific prohibition of the practice in the Seventh Amendment. *Gasperini v. Center For Humanities, Inc.*, 518 U.S. 415, 449 (1996) (Scalia, J., dissenting).

The Seventh Amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

U.S. Const., amend. vii.



Justice Story pronounced the re-examination provision as the "more important" clause. *Parsons v. Bedford,* 28 U.S. (3 Pet.) 433, 447 (1830). As he earlier explained, "one of the most powerful objections urged against [the Constitution]" was that it "would enable that court, with or without a new jury, to re-examine the whole facts, which had been settled by a previous jury." *United States v. Wonson,* 28 F.Cas. 745, 750 (No. 16,750) (C.C.Mass. 1812). The Re-examination Clause was intended to put to rest "apprehensions" of "new trials by the appellate courts." *See Gasperini, supra* at 452 (Scalia, J. dissenting).

Today, this Court is presented with an example of precisely the judicial usurpation of the jury right that the founders feared. Mr. Reeves sued Sanderson, his former employer, alleging that he was fired because of his age. The jury received both sides' evidence and found the employer had in fact discriminated against Reeves. The district court denied Sanderson's post-trial motions.

The court of appeals undertook a de novo review of both sides' record evidence and found differently. "[W]e conclude that Reeves did not prove a violation of the Age Discrimination in Employment Act ("ADEA") by a preponderance of the evidence. Hence we reverse the district court's order and render judgment in favor of Sanderson." Pet. at 1a-2a.

This pronouncement reads jarringly like the conclusion of a bench trial, rather than appellate review with due regard for the Seventh Amendment. Disturbingly, this decision is but an example of a broader trend among federal courts of appeals toward increased willingness to set aside the verdicts of juries in civil cases and enter judgment for the verdict loser, rather than order a new trial.

That the facts in this case were decided by an appellate panel rather than the jury might be a matter of indifference if trial by jury were simply an available

procedure for the resolution of private disputes. On the contrary, this Court has repeatedly emphasized:

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

*Dimick v. Schiedt*, 293 U.S. 474, 486 (1935), quoted in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959); *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 110 S. Ct. 1339, 1344-45 (1990). So vital is this great constitutional right that "it is only in exceptional cases and for specific causes that a party may be deprived of it." *Grand Chute v. Winegar*, 82 U.S. 373, 375 (1872); *Jacob v. New York City*, 315 U.S. 752, 752-753 (1942) ("The right of jury trial in civil cases at common law is a . . . right so fundamental and sacred to the citizen [that it] should be jealously guarded by the courts.").

The American colonists' reverence for the institution of the jury was rooted in the jury's role in England as a shield against governmental oppression, a matter of increasing interest to the colonials. They admired the heroism of Edward Bushel and the other jurors who refused to convict Quaker William Penn in 1670, though they were fined and jailed by the trial judge. *See* John Guinther, THE JURY IN AMERICA ch. 1 (1988). The acquittal in 1688 of seven Anglican bishops of seditious libel for signing a letter in opposing the king elevated the jury in public esteem "as a bulwark of liberty, as a means of preventing oppression by the Crown." Austin Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 Harv. L. Rev. 669, 676 (1918). "Treatises extolling the jury flooded the market and profoundly influenced eighteenth century American as well as English views about jury trial." *Id.* These examples undoubtedly influenced the New York jury that refused to convict journalist John Peter Zenger of seditious libel in



1734. Stephan Landsman, *The Civil Jury In America: Scenes From an Unappreciated History,* 44 Hastings L.J. 579, 593 (1993).

The civil jury as well was valued as a check on oppressive government. Americans cheered the jury verdicts in the lawsuits of John Wilkes and his printer against officials who executed an illegal warrant to arrest Wilkes and seize his allegedly seditious publication. Landsman, *supra*, at 591. They applauded Lord Camden's decisions recognizing the jury's authority to award exemplary damages. *Wilkes v. Wood,* Lofft 1, 98 Eng. Rep. 489 (K.B. 1763) and *Huckle v. Money*, 2 Wils. 205, 95 Eng.Rep. 768 (C.P. 1763). *See* Linda Schlueter & Kenneth Redden, PUNITIVE DAMAGES 6-9 (2d ed. 1989). Indeed, Wilkes' case was cited in debates in support of the need for a constitutional guarantee of the jury right in civil cases. *See* PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1778-1788, 781-82 (John B. McMaster & Frederick D. Stone eds. 1988)(statement of Robert Whitehall at Pennsylvania ratifying convention).

But the colonists found themselves frequently deprived of that right as England moved the adjudication of civil and criminal disputes from colonial courts, where local juries sat, to Vice-Admiralty courts and other non-jury tribunals administered by judges beholden to the Crown. *See* Carl Ubbelohde, THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION 209-11 (1960); Roscoe Pound, THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY 69-72 (1957).

They complained bitterly of these infringements through the Stamp Act Congress, the Continental Congress, and, finally, in the Declaration of Independence. ("For depriving us in many cases, of the benefits of Trial by Jury"). "The struggle over jury rights was, in reality, an important aspect of the fight for American independence." Landsman, *supra*, at 596.

For in transplanting the English jury system to the New World, the colonists had transformed it into an important means of governing themselves. Historical records of the period refer to the civil jury, and most especially the right to serve on civil juries, as a political right of immense importance to independence and self-government. *See, e.g.*, Vidram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 Cornell L. Rev. 203, 218 (1995); Alan Howard Scheiner, *Judicial Assessment of Punitive Damages, and the Politics of Jury Power*, 91 Colum. L. Rev. 142 (1991); William E. Nelson, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830 (1975).

By the time the United States declared independence, the civil jury was also valued as a shield against private oppression. In the developing economy, farmers, as well as shopkeepers and traders, depended upon credit. In the mid-1700s, jury caseloads across America soared as farmers and other debtors relied on local juries to ameliorate the harshness of the commercial law in the hands of judges who tended to be drawn from and identified with the wealthier class. Landsman at 594; Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 671-77 (1973).

So when the delegates emerged from their secret convention in Philadelphia in 1787 with a draft constitution that omitted a guarantee of the right to trial by jury in civil trials, many Americans were outraged. Moreover, the grant of appellate jurisdiction to the Supreme Court in Art. III §2, cl. 3 over issues of fact and law, suggested to many that the constitution represented "virtual abolition of the civil jury." Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289, 295 (1966); *see, e.g.*, 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 218 (J. Elliot 2d



ed. 1836)(remarks of James Monroe at the Virginia ratification convention).

Alexander Hamilton reported that "the want of a constitutional provision for the trial by jury in civil cases" was the most successful argument by opponents. THE FEDERALIST No. 83, at 495 (C. Rossiter ed. 1961). The Antifederalists harbored grave fears that the new national government would fall under the control of a small elite of moneyed interests and that the unelected, life-tenured federal judiciary would be selected from and would serve that elite. 3 THE COMPLETE ANTI-FEDERALIST 49 ("An Old Whig"). They frequently cited Blackstone's warning that judges tend to favor their own class; the jury was a shield against oppression by the wealthy as well as by government. Scheiner, *supra*, at 152-54. As Justice Story subsequently recounted, this objection "was pressed with an urgency and zeal, which were well nigh preventing its ratification." Joseph. Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 653 (1833)(R. Rotunda & J. Nowak eds. 1987).

Ultimately, the antifederalist arguments prevailed. "As soon as the constitution was adopted, this right was secured by the seventh amendment of the constitution proposed by congress; and which received an assent of the people, so general, as to establish its importance as a fundamental guarantee of the rights and liberties of the people." *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 445 (1830).

The Seventh Amendment stands as a limitation specifically directed at the power of the federal judiciary. *See Granfinanciera S.A. v. Nordberg*, 492 U.S. 33, 83 (1989) (White J. dissenting); Roscoe Pound, THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY 69-72 (1957). As Judge Patrick Higginbotham points out, "American federal courts . . . have a peculiar need for the democratizing influence of the jury" because an independent judiciary also

carries "its attendant risk of autocratic behavior." Patrick Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power,* 56 Texas L. Rev. 47, 52 (1977).

Historically, this Court has rigorously enforced this limitation.

> "During the first 180 years of the Bill of Rights, the constitutional guarantee most frequently and aggressively enforced by the Supreme Court was the seventh amendment right to trial by jury in civil cases. Prior to 1968 the Court regularly granted review in several cases each year to consider the sufficiency of the evidence to support a disputed jury verdict, and in the overwhelming majority of the more recent cases did so to reinstate a jury verdict that had been overturned by an appellate court."

Eric Schnapper, *Judges Against Juries -- Appellate Review of Federal Civil Jury Verdicts*, 1989 Wis. L. Rev. 237.

**B. Aggressive Appellate Review Of Jury Verdicts Threatens The Seventh Amendment Role Of The Jury.**

As the constitutional text suggests, "to ascertain the scope and meaning of the Seventh Amendment resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791." *Dimick v. Schiedt,* 293 U.S. 474, 476 (1935). The court of appeals decision in this case is a far cry from what the drafters had in mind as exceedingly limited review of jury findings "according to the rules of common law."

"The only modes known to the common law to re-examine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a venire facias de novo, by an appellate court, for some error of law which intervened in the proceedings." *Parsons, supra,* at 448. A venire facias



de novo was an order directing a new trial. Black's Law Dictionary 1727 (4th ed. 1951). At best, then, the losing party could obtain only a new trial. At common law, the only means of avoiding the verdict of a jury was the demurrer, in which the movant was obliged to admit all the facts as well as the inferences that might be drawn therefrom, presenting the court with only issues of law. The only means of review of judgments entered upon a jury's verdict was by writ of error on issues of law alone. *See Galloway v. United States*, 319 U.S. 372, 407 (1943)(Black, J., dissenting). Hence, appellate review was limited strictly to issues of law. *See Gasperini v. Center For Humanities, Inc.*, 518 U.S. 415 ,449, 452-53 (1996) (Scalia, J., dissenting). Judgment as a matter of law, as provided for in Fed. R. Civ. Pro. 50, was unknown at common law in trial courts, much less in appellate tribunals. *Gasperini,* 518 U.S. at 436 n.20.

This Court has long held the view that the Seventh Amendment "does not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791,'" *Colgrove v. Battin,* 413 U.S. 149, 156-57 (1973), quoting *Galloway v. United States,* 319 U.S. 372, 390 (1943). Hence there exists no general bar to the invention of new procedural devices in jury trials, so long as the essential role of the jury as finder of fact is preserved.

At the trial level, 19th Century judges gained some measure of control over juries by use of the directed verdict and, later judgment n.o.v. The Court approved the directed verdict in *Parks v. Ross*, 52 U.S. (11 How.) 362 (1850) as equivalent to the demurrer. It did not violate the Seventh Amendment when there was "no evidence whatever" to sustain a verdict favoring the nonmovant. *Id.* at 372-73. Where there is not sufficient evidence to raise a question of fact, there is nothing for the jury to decide and submission of

the case to a jury would be an empty gesture.[2] An issue of fact on which there is no evidence becomes an issue of law. The Court insisted, however, that a directed verdict was proper if there was "no evidence" on the factual issue; but not if there were "some." *Hickman v. Jones*, 76 U.S. 197, 201 (1869).

The Court appeared to relax that standard somewhat in *Schuylkill and Dauphin Improvement Co. v. Munson*, 81 U.S. (14 Wall.) 442 (1871), allowing a directed verdict when the evidence offered by the nonmovant was too insubstantial to support a reasonable jury's verdict in its favor, reasoning that the Seventh Amendment entitles a party to only a reasonable jury's consideration. *Id.* at 447-48. Lower courts have increasingly loosened the standard to one of "substantial" evidence or evidence sufficient for a "reasonable juror." Schnapper at 277; Charles A. Wright, Arthur R. Miller, Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE § 2529 (1995) [hereinafter "Wright and Miller"].

This Court has not approved a more lenient standard for appellate courts. At common law, review of judgments was had only on writ of error, limited to questions of law. *Parsons v. Bedford*, 3 Pet. 433, 445-46 (1830) (Story, J.)(district court did not err in refusing to allow transcription of witness testimony for appeal because "[t]he whole object" of the transcription was "to present the evidence here in order to establish the error of the verdict in matters of fact," which is not permissible on writ of error).

> No one supposed or claimed for one moment, that the English common-law jury could exist under a system of law that allowed an appeal from a verdict of a jury to a bench of judges with affirmative judicial power to find

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[2] Previously, even where there was no evidence tending to prove a particular fact, courts were obliged to allow "the jury the right of weighing the evidence and determining what effect it shall have." *Greenleaf v. Birth*, 9 Pet. 292, 299 (1835)



> the same fact in issue different from the finding of the jury, albeit on the same evidence.

Henry Schofield, *New Trials and the Seventh Amendment -- Slocum v. New York Life Insurance Co.*, 8 Ill. L. Rev. 287, 303 (1913).

Long after trial judges were permitted to enter directed verdicts, this Court held that an appellate court could not itself enter judgment n.o.v. upon finding that a directed verdict was erroneously denied below. The Seventh Amendment entitled the appellee a retrial by a new jury. *Slocum v. New York Life Insurance Co.*, 228 U.S. 364 (1914).[3]

After the adoption of the Federal Rules of Civil Procedure in 1938, courts of appeals construed Rule 50 as permitting the entry of judgment n.o.v. based on the insufficiency of the evidence rather than a new trial.

Justice Black cautioned in *Galloway v. United States*:

> A verdict should be directed, if at all, only when, without weighing the credibility of the witnesses, there is in the evidence no room for honest difference of opinion over the factual issues in controversy. I shall continue to believe, that in all other cases a judge should, in obedience to the command of the Seventh Amendment, not interfere with the jury's function. Since this is a matter of high constitutional importance, appellate courts should be alert to insure the preservation of this constitutional right.

319 U.S. 372, 407 (1943)(Black, J., dissenting).

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[3] The court in *Redman* "undermined Slocum by adopting from English practice the 'reservation of a point' originally performed by a nisi prius judge who wanted a decision later en banc at Westminster, to justify the appellate court's grant of judgment n.o.v. Rule 50(b), passed in 1938, converted the reservation into a fiction by 'deeming' it to have been made whenever a directed verdict motion was denied." *Henderson, supra* at 337 n.211

Indeed, this Court exercised great vigilance. From 1938 to 1968, the Court granted certiorari in 25 cases in which federal courts of appeals had overturned jury verdicts for insufficient evidence. The Court ordered reinstatement of the verdicts in 24 of the cases. Schnapper, *supra*, at 241.

It was not until *Neely v. Martin K. Eby Const. Co.*, 386 U.S 317, 324 (1967) that this Court expressly approved the entry of judgment n.o.v. "in appropriate cases." After 1968, however, the Court granted review in relatively few such cases. During that period, in the absence of strong guidance from this Court, there occurred a noticeable increase in the number of lower federal court decisions overturning jury verdicts on the basis of sufficiency of evidence, few of which even referred to the Seventh Amendment. Schnapper, *supra* at 246-253.

A major factor in this trend toward increasingly aggressive review of jury verdicts by appellate courts was the appellate courts' adoption of the more relaxed standard which had become increasingly favored by the district courts, rejecting the "no-evidence" rule in favor of "substantial evidence" or "reasonable jury" formulations. *See* Wright and Miller, supra, at § 2522; Steven Alan Childress *A 1995 Primer On Standards Of Review In Federal Civil Appeals*, 161 F.R.D. 123, 133 (1995).

In applying this standard, courts permitted themselves to consider the evidence introduced by both sides. *Id.* The older rule originating from the demurrer, that a verdict cannot be overturned by contrary evidence from the losing party, became "virtually a dead letter" in the lower federal courts. Schnapper, *supra,* at 294

The magnitude of the trend is apparent from a survey of federal court of appeals opinions issued during 1984-85. In 175 cases in which verdict loser asked for appellate judgment n.o.v., the appellate court granted judgment in 67 cases. *Id.* at 248. The results suggest that:



> [A] large number of appellate judges simply cannot resist acting like superjurors, reviewing and revising civil verdicts to assure that the result is precisely the verdict they would have returned had they been in the jury box.

*Id.*, at 354.

The result has been "the 'gradual process of judicial erosion which . . . has slowly worn away a major portion of the essential guarantee of the Seventh Amendment.'" *Parklane Hosiery Co., Inc. v. Shore,* 439 U.S. 322, 339 (1979)(Rehnquist, J., dissenting), quoting Justice Black in *Galloway,* 319 U.S. at 397. Recently, however, the Court has turned its attention once again to the protection of the Seventh Amendment right to trial by jury and to the limits imposed on federal courts of appeals by the Re-examination Clause. *Hetzel v. Prince William County*, 523 U.S. 208 (1998)

## II. APPELLATE COURTS MAY SET ASIDE A JURY VERDICT AND ENTER JUDGMENT AS A MATTER OF LAW ONLY WHERE THERE IS NO EVIDENCE SUPPORTING THE VERDICT.

### A. The Lower Court's Entry of Judgment As A Matter of Law Based on De Novo Review of All the Evidence Is Inconsistent With Fed. R. Civ. Pro. 50.

Rule 50 does not expressly provide for entry of judgment as a matter of law by an appellate court.[4] As a

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[4] **Denial of Motion for Judgment as a Matter of Law.**
If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to

general proposition, this Court has stated, "there is nothing in Rule 50(d) indicating that the court of appeals may not direct entry of judgment n.o.v. in appropriate cases." *Neely v. Martin K. Eby Const. Co.*, 386 U.S 317, 324 (1967). Amicus suggests that cases in which the nonmovant has introduced *some* evidence on a factual issue are not "appropriate" cases -- even where the appellate court is convinced that a reasonable jury would deem the evidence unpersuasive or overmatched by opposing evidence. In such cases, the court should be limited to the options provided by Rule 50(d) -- ordering a new trial or remanding to the trial court for determination of whether a new trial is warranted.

Even a cursory review of the lower court's short unpublished opinion demonstrates the appropriateness of this construction. Reeves, a 57-year-old Sanderson employee, was fired and replaced with a younger man. Chesnut, the Director of Manufacturing who recommended the firing, had made derogatory remarks about Reeves' age. Sanderson did not dispute that Reeves had made out a prima facie case of age discrimination, but claimed that he was fired because of his "shoddy record keeping." Pet. at 7a. The jury, however, found that Sanderson had discriminated against Reeves because of his age. The trial judge denied defense motions for judgment as a matter of law or a new trial.

The court of appeals reviewed the record de novo to find "that Reeves did not introduce sufficient evidence of age discrimination." Pet. at 10a. By undertaking an assessment of

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a new trial, or from directing the trial court to determine whether a new trial shall be granted.

Fed. R. Civ. Pro. 50(d).

The 1963 Advisory Committee's Note adds:

**Subdivision (d)** does not attempt a regulation of all aspects of the procedure where the motion for judgment n.o.v. and any accompanying motion for a new trial are denied, since the problems have not been fully canvassed in the decisions and the procedure is in some respects still in a formative stage. It is, however, designed to give guidance on certain important features of the practice.



all the evidence introduced by both sides, the court made it necessary to assign some weight and credibility to various items of proof -- evaluations which might and likely did differ from those made by the jury. For example, the court gave little weight to Chesnut's disparaging remarks, because he was only one of three persons who recommended the firing to the company president. The jury might well accord them greater weight inasmuch as Chesnut was married to the company president. The court set great store in the fact that the president was only five years younger than Reeves and other managerial employees were over the age of 50. Pet. at 9a & 10a. The jury apparently gave little weight to the notion that those who ran the company would not treat workers in a fashion they would not want for themselves.

The court brushed aside the "inconsistency" between the reason given to Reeves when he was fired and that advanced at trial as indicative of good trial preparation, rather than mendacity. Pet. at 8a. The jury may have found Sanderson's explanation rather less credible for that. The court was not concerned that Sanderson may not have been "forthright in its explanation for firing Reeves." The jury might have deemed this a matter of greater import because Sanderson was now asking the jurors to believe its explanation.

It requires a fair amount of confidence to declare that no reasonable jury could find that Sanderson discriminated when, in fact, the jury found precisely that. The court's plenary review of the record does not allow for the possibility that such confidence might be unwarranted. Ascertainment of intent or motive generally requires some drawing of inferences and assessment of credibility. It is a fair estimate that many jurors have first-hand experience in the workplace and are more adept at reading the clues surrounding a company's employment decisions than life-tenured federal judges. To examine both sides' evidence, including that which the jury ignored or disbelieved, disregards the

knowledgeable jury as unreasonable. The trial judge who occupied a front-row seat as the case unfolded before the jury would likely possess the most reliable insight into whether the jury was unreasonable. By engaging in de novo review, applying the same standard as applied by the trial judge, the court of appeals renders the judge's evaluation of the sufficiency of the evidence of no consequence whatever.

In *Neely*, the Court did not issue blanket approval for an appellate court to enter judgment as a matter of law whenever it determines that such a judgment should have been granted below. Indeed, Justice White's opinion is carefully nuanced:

> There are, on the one hand, situations where the defendant's grounds for setting aside the jury's verdict raise questions of subject matter jurisdiction or dispositive issues of law which, if resolved in defendant's favor, must necessarily terminate the litigation. . . . In such situations, and others like them, there can be no reason whatsoever to prevent the court of appeals from ordering dismissal of the action or the entry of judgment for the defendant.
>
> On the other hand, where the court of appeals sets aside the jury's verdict because the evidence was insufficient to send the case to the jury, it is not so clear that the litigation should be terminated.

386 U.S. at 326-27.

> Part of the Court's concern has been to protect the rights of the party whose jury verdict has been set aside on appeal and who may have valid grounds for a new trial, some or all of which should be passed upon by the district court, rather than the court of appeals, because of the trial judge's firsthand knowledge of witnesses, testimony, and issues -- because of his 'feel' for the overall case. These are very valid concerns to which the court of appeals should be constantly alert.

*Id* at 325.



Hence, the Court concluded, "the court of appeals may make final disposition of the issues presented, except those which in its informed discretion should be reserved for the trial court." *Id.* at 329.

Amicus suggests that this exception encompasses cases, such as Reeves', where the nonmovant has introduced some evidence, albeit not a legally sufficient quantum in the view of the appellate court. Even where the evidence is insufficient to support the verdict returned by a jury, Rule 50 requires an exercise of informed discretion to determine whether a new trial is warranted rather than judgment as a matter of law. In cases where there is no evidence to support the verdict, the court of appeals is capable of ruling, as a matter of law, that denial of an appropriate Rule 50(b) motion constituted clear error on the part of the district judge. *Compare* Fed. R. Civ. Pro. 52. *Neely* indicates that the court of appeals may enter judgment under that circumstance, though Rule 50(d) does not oblige it to do so.

Where the verdict winner has adduced at least some evidence, the appellate court is not equipped to exercise that informed discretion called for by the Rule. As this Court had earlier explained:

> Rule 50(b) . . . does not compel a trial judge to enter a judgment notwithstanding the verdict instead of ordering a new trial; it permits him to exercise a discretion to choose between the two alternatives. And he can exercise this discretion with a fresh personal knowledge of the issues involved, the kind of evidence given, and the impression made by witnesses. His appraisal of the bona fides of the claims asserted by the litigants is of great value in reaching a conclusion as to whether a new trial should be granted. Determination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart."

*Cone v. West Virginia Pulp and Paper Co.*, 330 U.S. 212, 215-16 (1947); *see also Globe Liquor Co., Inc. v. San Roman*, 332 U.S. 571 (1948).

In the instant case, for example, the court of appeals was obliged to speculate whether the "inconsistency" between the reasons first given to Reeves for his firing and those ultimately presented at trial "smacks more of competent trial preparation than telling a lie." Pet. at 8a. Though the paper record might be opaque, the trial judge may be expected to have greater insight into the significance of the change.

Amicus suggests that such cases in which some evidence is nonetheless held to be legally insufficient present the circumstance addressed by the Advisory Committee's Note to Rule 50(d), which states that "remanding the case for a determination by the trial court as to whether a new trial should be granted. . . . is advisable where the grounds urged are suitable for the exercise of trial court discretion."

Less than two months after its decision in *Neely*, this Court issued a per curiam decision applying *Neely* which could well stand as an appropriate resolution of the instant case:

> Under these circumstances, we think the Court of Appeals erred in directing entry of judgment for respondent; the case should have been remanded to the Trial Judge, who was in the best position to pass upon the question of a new trial in light of the evidence, his charge to the jury, and the jury's verdict and interrogatory answers.

*Iacurci v. Lummus Co.*, 387 U.S. 86, 88 (1967)

**B. Appellate Court Entry of Judgment As A Matter of Law Based on De Novo Review of All the Evidence Violates the Seventh Amendment**



Even allowing that Rule 50 permits an appellate court to set aside a jury verdict and enter judgment as a matter of law, a procedure that was not available at common law in 1791, the exercise of such power must not be permitted to violate the essential function of the Seventh Amendment, which is the preservation of "the common law distinction between the province of the court and that of the jury, whereby . . . issues of law are resolved by the court and issues of fact are to be determined by the jury." *Baltimore & Carolina Line v. Redman,* 295 U.S. 654, 657 (1935).

For these reasons, this Court has been highly protective of the jury's role:

> Credibility determinations, the weighing of the evidence, and the drawing of inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.

*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). *See also McKnight v. Johnson Controls, Inc.*, 36 F.3d 1196 (8th Cir. 1994) (on motion under Rule 50 for judgment as a matter of law, courts "must not engage in a weighing or evaluation of the evidence or consider questions of credibility" in determining that no reasonable inference can sustain the verdict).

With respect to the standard to be applied by trial judges in passing on the legal sufficiency of the evidence, Justice Black in his *Galloway* dissent complained that this Court had abandoned the original "no-evidence" standard in favor of one that required "substantial evidence" from the nonmovant, occasioning a "transition from jury supremacy to jury subordination." 319 U.S. at 403-04 (Black, J. dissenting). That more aggressive standard invites courts to consider all the evidence introduced by both sides, a practice that "comes dangerously close to a judicial weighing of the evidence." Wright and Miller at § 2529.

As to the standard to be applied by a court of appeals reviewing the denial of judgment n.o.v., however, the Court has held appellate courts to the no-evidence standard, based solely on the non-movant's evidence, which was the original basis for approving the directed verdict as a replacement for demurrer.

In *Lavender v. Kurn,* a state supreme court overturned a jury verdict for plaintiff in a Federal Employees Liability Act suit, after examining the evidence of both parties and concluding there was "no substantial evidence of negligence." This Court reversed:

> It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. *Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.* But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.

327 U.S. 645, 653 (1946) (emphasis added).

This Court made clear that its decision was based on the right to trial by jury, stating, "it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury." Id. at 652-53.

The Court subsequently reiterated its position that it "is



the established rule that in passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given." *Wilkerson v. McCarthy,* 336 U.S. 53, 57 (1949).

Amicus submits that the Seventh Amendment imposes a stricter standard on appellate courts than may be tolerated at the trial court level. As the Court stated in *Gasperini*, "practical reasons combine with Seventh Amendment constraints" to warrant different standards regarding review of jury verdicts for trial judges, who "have the 'unique opportunity to consider the evidence in the living courtroom context, . . . while appellate judges see only the 'cold paper record.'" Gasperini at 438. (citation omitted)

The Fifth Circuit expressly rejected the no-evidence rule in *Boeing Co. v. Shipman,* 411 F.2d 365 (5th Cir. 1969), dismissing this Court's decisions as applicable only to FELA cases. This Court's opinion in *Lavender* does not limit its discussion of the right to trial by jury to cases brought under the FELA. The Reexamination Clause applies to all cases in which a jury has made a finding of fact, regardless of whether the right to trial by jury arises from federal statute or the constitutional command contained in the amendment's first clause. The FELA expresses a strong policy that favors jury determinations. it cannot be argued that the federal antidiscrimination statutes, such as the ADEA, or the Seventh Amendment itself which explicitly preserves the jury right, express a lesser policy.

This Court recently underscored the restrictions imposed by the Seventh Amendment on appellate courts in *Hetzel v. Prince William County*, ___ U.S. ___, 118 S. Ct. 1210 (1998), a discrimination case under Title VII and §1983. The Court held that, even where the court determined that the amount of damages was grossly excessive, the Seventh Amendment prohibits the court from substituting its

own assessment of the appropriate damages, and requires that the party be given the option of a new trial.

**C. Strong Policy Reasons Support Limiting Appellate Authority to Enter Judgment as a Matter of Law To Cases In Which There Is No Evidence To Support The Jury's Verdict.**

Quite apart from the constitutional command of the Seventh Amendment, strong policy reasons support a ruling by this Court that appellate courts may enter judgment as a matter of law only where there is no evidence to support the verdict.

*1. Fairness*

This Court in *Neely* emphasized that concerns for fairness toward the verdict winner generally require the court of appeals to order a new trial or remand to the district court to determine whether a new trial is warranted, rather than enter judgment. 386 U.S. at 325. In this case, for example, plaintiff may have given little attention to the fact that the company president was only five years younger than Reeves or that a certain percentage of managerial employees were in their fifties or sixties. For the appellate court to focus on these facts may unfairly deprive plaintiff of the opportunity to introduce additional or contradictory evidence that he would have pursued if he had known its importance. Plaintiff justifiably relied on the district court's determination, both before and after the verdict, that the evidence he had adduced was sufficient to support a verdict. At minimum, fairness requires the court of appeals to remand to the trial court for a determination whether plaintiff should be allowed to refashion his case before a new jury.

Such a situation is analogous to the position of a verdict winner whose evidence is subsequently held erroneously admitted. As the Eighth Circuit states, fairness is that circumstance requires that the verdict winner be afforded



a new trial, rather than be subject of judgment as a matter of law:

> The subsequent ruling [to exclude admitted evidence], after the verdict, . . . placed plaintiff in a relative position of unfair reliance. If plaintiff had been forewarned during the trial that such [evidence] was not admissible it conceivably could have supplied further foundation or even totally different evidence. Under these circumstances the grant of the judgment n.o.v. was not a proper remedy.

*Midcontinent Broadcasting Co. v. North Central Airlines,* 471 F.2d 357, 359 (8th Cir. 1973).

*2. Accuracy*

If "history and precedent provide no clear answers," this Court has said, "functional considerations also play their part in the choice between judge and jury." *Markman v. Westview Instruments, Inc.*, .517 U.S. 370 (1996). In that case, this Court determined that defining terms of art in a patent was peculiarly suited to the judge, who "is more likely to give a proper interpretation to such instruments than a jury; and he is, therefore, more likely to be right, in performing such a duty, than a jury can be expected to be." In such cases "a jury's capabilities to evaluate demeanor, to sense the 'mainsprings of human conduct,' or to reflect community standards are much less significant. *Id.* at 389-90 (citations omitted)

Many of the cases in which appellate courts enter judgment as a matter of law, like this case, involve issues of intent or motive, particularly in the context of employment discrimination. Schnapper, *supra* at 249-50 and so involve precisely those capabilities that make the jury "more likely to be right."

*3. The Best Use of Judicial Resources*

The plain fact is that even the most conscientious appellate judges can devote only a limited amount of time to

scrutinizing voluminous paper records associated with appeals from denials of post verdict motions. Yet the appellate tribunal cannot achieve the familiarity and detailed knowledge of a case possessed by the trial judge. A rule which requires a court of appeals to remand cases in which there is some, though not legally sufficient evidence to support the verdict, places the discretionary decision whether to enter judgment as a matter of law or proceed with a new trial in the hands of the judge who is best equipped to make that decision.

Even if it is not altogether certain that the practice of de novo review of the entire record is a clear violation of the Seventh Amendment, the importance of the jury right should lead this Court to conclude that it amounts to an abuse of the appellate court's discretion under Rule 50. Justice Blackmun advised, "uncertainty in the historical record should lead us . . . to give the constitutional right to a jury trial the benefit of the doubt." *Granfinanciera S.A. v. Nordberg*, 492 U.S. 33, 92 (1989) (Blackmun, J, dissenting). "If, in the rare case, a tie-breaker is needed," Justice Brennan once counseled, "let us break the tie in favor of jury trial." *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 580 (1990)(Brennan, J., concurring).



## CONCLUSION

For the foregoing reasons, Amicus urges this Court to reverse the judgment of the court of appeals.

Respectfully submitted,

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